SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 232.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

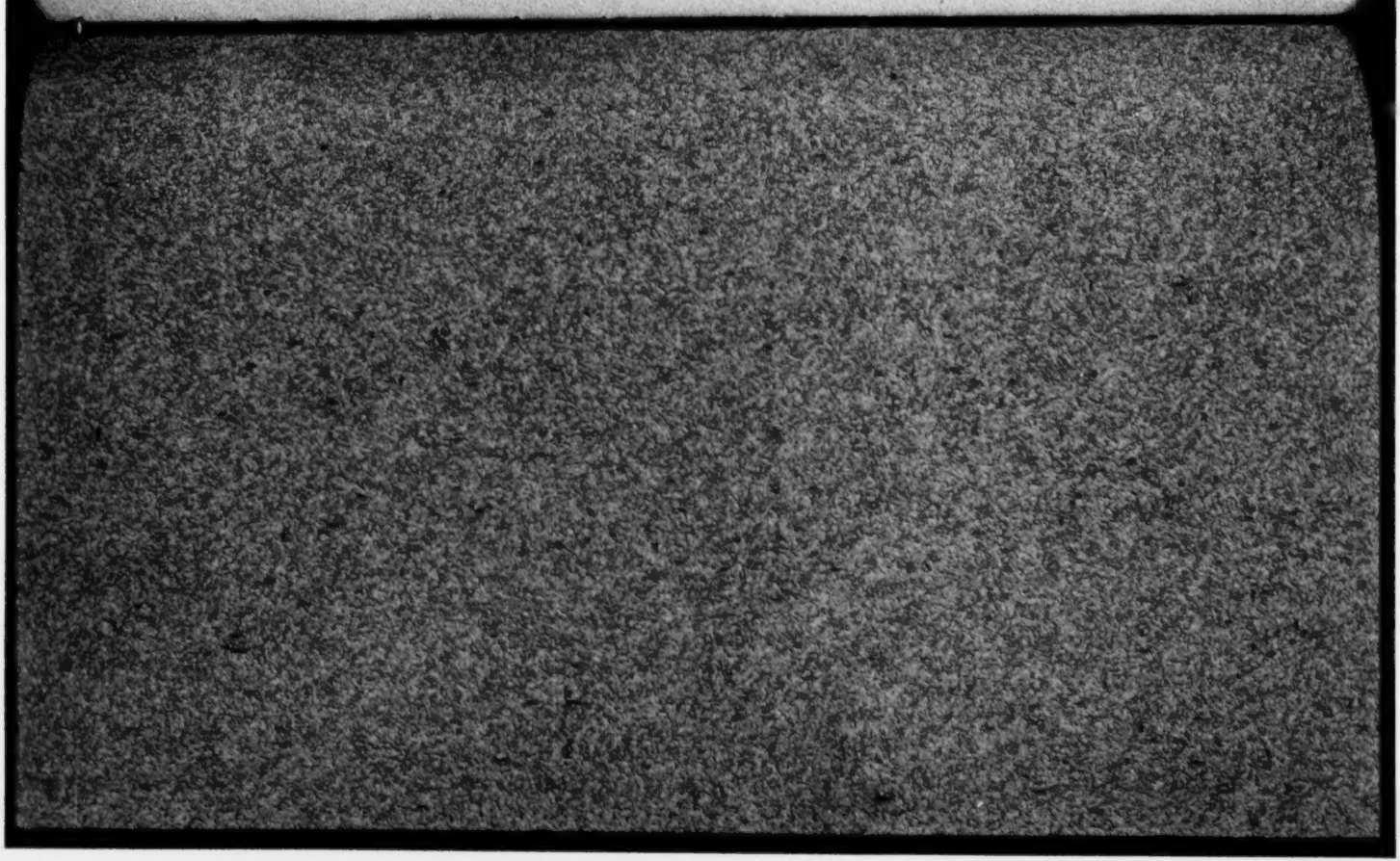
vs.

WILLIAM H. GRAY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR AND ARGUMENT IN OPPOSITION TO MOTION OF PLAINTIFF IN ERROR TO AMEND ITS ASSIGNMENT OF SPECIFICATION OF ERRORS.

STEPHEN J. McMAHON,
Attorney for Defendant in Error,
William H. Gray.



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I.

STATEMENT OF MOTION.

On March 11, 1915, there was served on the attorney for defendant in error a motion of plaintiff in error, and notice thereof, for leave to amend its assignment of errors by in-

serting an assignment pertaining to the testimony of Mr. Armstrong on the subject of interstate commerce. On March 10, 1915, a similar motion and notice, returnable on March 23, 1915, was served. This testimony is fully set forth verbatim at pages 6 to 9 of the Brief of Defendant in Error (*post*, pp. 22-24).

Facts.

This motion and notice and the affidavit of Edward M. Smart, counsel for plaintiff in error, which accompanies the same, are set forth verbatim in an appendix to this supplemental brief and argument (*post*, pp. 21-28).

The reason for thus setting them forth is that they have not, at the time of the writing of this supplemental brief and argument, been printed.

This motion of plaintiff in error has been set for hearing before this court on March 22, 1915 (*post*, p. 21).

On March 13, 1915, there was served on counsel for plaintiff in error (*post*, p. 8) notice of opposition to this motion by defendant in error (*post*, p. 7) with the affidavits of the defendant in error (*post*, p. 8), his attorney (*post*, p. 12), Jeremiah F. Collins (*post*, p. 17), and Raymond T. Zillmer (*post*, p. 20) in support of such opposition. This notice of opposition together with these affidavits are set forth fully in the appendix herein (*post*, pp. 8-21).

These affidavits set forth facts relied on in the argument herein, in addition to the facts contained in the transcript of the record, and further attention will be called to these facts in the argument which follows.

II.

ARGUMENT.

The motion should be denied for the following reasons:

1st. (A) If there is a defect in the writ of error not susceptible of amendment, as pointed out in the first part of the first branch of the argument at pages 13 to 16 of the Brief of Defendant in Error, this court has no jurisdiction of the case, and, therefore, no jurisdiction to permit the proposed amendment to be made.

(B) Permitting the proposed amendment to be made would not in any way supply the Federal question, which is wholly wanting in this case, as pointed out in the second part of the first branch of the argument, at pages 17 to 29 of the Brief of Defendant in Error. In this part of this branch of the argument it is assumed, at the outset, solely for the purposes of the argument, that the alleged error which it is proposed to assign in the proposed amendment does not exist.

2d. Assuming, solely for the purposes of the argument, and without conceding that there was error of the character set forth in the proposed amendment, it would not be sufficiently clear, as pointed out in the second branch of the argument, at pages 29 to 32 of the Brief of Defendant in Error, that the error complained of (if error) has worked *prejudice* to the *substantial* rights of the plaintiff in error to such an extent as will *require* reversal. This assumption is also made, at the outset, in this branch of the argument.

3d. No *"plain error"* within the meaning of Rule 21 of this court, and particularly section 4 and subsection 2 of section 2 thereof, was committed by ultimately striking out the testimony covered by the proposed amendment to the

assignment of errors, as pointed out in the third branch of the argument, at pages 32 to 68 of the Brief of Defendant in Error. Since there is no such *"plain error"* this court, it is respectfully submitted, ought not *"notice"* the same, under the provisions of said section 4, to the extent of per-

Furthermore, it appears from the affidavit of defendant in error that the plaintiff in error is not entitled to any offset under section 5 of the Federal Employers' Liability Act (*post*, p. 10); Brief of Defendant in Error, p. 78).

By bringing this motion counsel for plaintiff in error tacitly concedes that without the proposed amendment there is no assignment of error in the record which reaches the alleged error upon which he relies; furthermore, in his affidavit he expressly makes this concession by admitting that "an assignment of error *should* have been made in the form now proposed" (*post*, p. 28).

4th. In the statement of the grounds for this motion, counsel for plaintiff in error complains that the attorney for defendant in error has made no "motion in this court, based on the inadequacy of said assignment of errors." It appears from the affidavits of the defendant in error and his attorney that the reason why no motion was made, soon after this writ of error was sued out, in his behalf, to affirm or dismiss, pursuant to Rule 6 of this court, was because of the impoverished financial condition of the defendant in error, caused by his injuries for which damages are sought in this action, and the resulting destruction of his earning capacity; that as early as November, 1913, counsel for plaintiff in error was requested to have his client advance the money necessary for the printing of the record somewhat in advance, merely, of the time when he was required to advance it, so that a motion might be made in behalf of defendant in error to *"affirm or dismiss"*; that in December, 1913, counsel for the plaintiff in error refused to thus advance such money to enable the making of such motion;

that the record was not printed until the last of September, 1914; that the case then seemed apt to be reached in its regular order early in 1915; and that this fact, coupled with the possibility of additional expense incident to the making of a motion, prevented the motion being made in the latter part of 1914. In view of these facts, the failure of the defendant in error to make a motion upon any of the grounds mentioned in Rule 6 of this court, or other grounds, ought not to be charged against the plaintiff in error or his attorney.

But, on the contrary, the refusal of counsel for the plaintiff in error to cause his client to somewhat sooner advance the money to enable the record to be printed so that such motion might be brought in behalf of defendant in error is additional evidence that this writ of error was sued out merely for delay, and, therefore, an additional reason why the defendant in error should be awarded the full amount of damages for delay authorized by the rule of this court, as pointed out in the fourth branch of the argument, at pages 68 to 71 of the Brief of Defendant in Error.

All of the foregoing reasons in opposition to the motion to amend the assignment of errors apply with equal force to the attempt made by counsel for plaintiff in error to amend the specifications of error in his brief by reprinting his brief and inserting therein the same claim of error set forth in the proposed amendment to the assignment of errors (*post*, p. 28).

That service of the reprinted brief was refused (contrary to the claims of counsel for plaintiff in error) by the attorney for defendant in error; that the explanation of such refusal found on page 1 of the Brief of Defendant in Error is founded in fact, and that the reasons for such refusal, as set forth in such explanation, with other reasons, were made known to counsel for the plaintiff in error at the time of such refusal are supported by proof, is shown by the affidavits of

the attorney for defendant in error (*post*, p. 14), Jeremiah F. Collins (*post*, p. 17) and Raymond T. Zillmer (*post*, p. 20).

It is respectfully submitted that the motion should be denied; that the writ of error should be dismissed, or the judgments of the State courts be affirmed; and that the defendant in error should be awarded the full amount of damages for delay authorized by the rule of this court.

STEPHEN J. McMAHON,
Attorney for Defendant in Error,
William H. Gray.

APPENDIX.

Notice of Opposition to Motion.

(Title of Case Omitted.)

SIR: Please take notice that the affidavits of William H. Gray, defendant in error; Stephen J. McMahon, his attorney; Jeremiah F. Collins and Raymond T. Zillmer, copies of which are hereto annexed, will be used and relied upon by the counsel for the defendant in error in opposing the granting of the written motions of the plaintiff in error dated March 10, 1915, set for argument on the 22d day of March, 1915, and the 23rd day of March, 1915, respectively, and served on said counsel for the defendant in error on the 11th and 10th days of March, 1915, respectively, without prejudice to the rights of the defendant in error.

Please take further notice that in opposing said motions counsel for the defendant in error will also rely on the record in this case, the briefs of the counsel for the plaintiff in error and of the counsel for the defendant in error, and the whole thereof, heretofore served and filed.

And you will please take further notice that counsel for the defendant in error will be ready for the hearing and argument of this case when the case is reached and called in its regular and proper order on the docket or calendar of the above-named court for the October term, 1914, pursuant to rule 26, and more particularly section 1 thereof, of said court; that counsel for the defendant in error expects and intends to make an oral argument in this case when it is so reached upon such docket or calendar; that counsel for the defendant in error intends and expects to be present at the opening of the session of the above-named court on the 15th

day of March, 1915, and to continue in attendance upon the sessions of said court until said case, as well as said motions, is heard and argued; and that counsel for the defendant in error desires, and, to the extent that the other rules and practices of the court will permit, will insist that this case be heard and argued in its regular and proper order on the docket or calendar of the above-named court for the October term, 1914, pursuant to said rule 26, and particularly section 1 thereof.

Respectfully,

STEPHEN J. McMAHON,
Attorney for Defendant in Error.

To Edward M. Smart, Counsel for Plaintiff in Error.

Service of the above notice of motion, and affidavits, admitted this 13th day of March, 1915.

EDWARD M. SMART,
Counsel for Plaintiff in Error.

Affidavit of William H. Gray.

(Title of Case Omitted.)

STATE OF WISCONSIN,
Outagamie County, ss:

William H. Gray, being first duly sworn, on oath deposes and states that he is the above-named defendant in error in the above-entitled case, now pending in the Supreme Court of the United States;

That the reason why no motion has been made in this court in behalf of deponent to dismiss the writ of error or affirm the judgments of the Wisconsin courts because of the inadequacy of the assignment of errors of the plaintiff in error or for other cause is that deponent did not have and

could not procure the necessary money required to be advanced to the clerk of this court in order to have the transcript of the record printed previous to the time when the clerk required the defendant in error to advance the money necessary to be advanced in order to have such record printed; that deponent was informed by his attorney herein that the transcript of the record was not received by him from the clerk of this court until on or about the 21st day of September, 1914; that at that time deponent was informed and verily believed that the case would be reached for hearing in the regular order and due course about January or February, 1915; that when the transcript of the record was printed deponent was in such poor financial circumstances that he concluded to await the final hearing and determination of the case, which then seemed liable to occur so soon thereafter, to present to this court through his attorney the questions as to whether the writ of error should be dismissed or the judgments of the State courts affirmed for the reason that deponent could not afford the double expense of having briefs printed upon motions and again upon the final hearing or the other additional expense which might be necessary to the proper presentation of any motion in advance of the final hearing and in addition to the expense necessary to the proper presentation of deponent's case to this court upon the final hearing; that not later than about the latter part of December, 1914, deponent's attorney herein requested deponent to procure the money necessary to be advanced to have the transcript of the record printed; that deponent's said attorney then informed deponent that it would be necessary to advance to the clerk of this court in order to have the record printed the sum of six hundred and fifty ($650.00) dollars; that deponent then made an effort to borrow the said sum of six hundred and fifty ($650.00) dollars for such purpose but was unable so to do; that deponent was never able to procure by borrowing or otherwise said sum of six hundred and fifty ($650.00) dollars;

that the reason why deponent was unable to procure and advance said sum of six hundred and fifty ($650.00) dollars is that deponent has been wholly unable to perform any work or labor or earn any money since he was injured, as set forth in the testimony in this case on the 19th day of January, 1911; that the injuries described in said testimony have wholly destroyed his earning capacity; that deponent has gradually failed in health since the time of said injury and more particularly since the time of the trial of said case in the municipal court of Outagamie County, Wisconsin; that at the present time deponent's health is very poor; that deponent, during all of the time referred to in this affidavit has had a wife and also a minor daughter dependent upon him for support and that during a large part of said time he has also had dependent upon him for support a minor son; that during all of said time deponent has been obliged to exhaust his resources and his borrowing capacity to provide the necessaries of life for his said wife and children and himself; that because of the poor health and illness of deponent he has been subjected to unusual and extraordinary expenses for medicines, the services of physicians and hospital expenses in a futile effort to regain his health; that if it had not been for the poverty of the deponent as aforesaid his attorney would have been authorized, directed and required, not later than about the 1st of January, 1915, to make a motion in this court to dismiss the writ of error herein or affirm the judgments of the State courts;

That the above-named plaintiff in error, Chicago and Northwestern Railway has not contributed or paid, does not contribute or pay, and is not to contribute or pay, in any way, any sum whatsoever to any insurance, relief benefit, or indemnity contributed or paid in any way or that may have been in any way contributed or paid by said plaintiff in error or any other corporation, association, or person to affiant or any other person entitled thereto on account of the injury to or sustained by affiant described in affiant's com-

plaint and evidence in said action, for which said action was brought; that said plaintiff in error is not, has not been, and will not be under any duty or obligation whatsoever to make such contribution or payment to any such insurance, relief benefit, or indemnity or to make any other contribution or payment whatsoever to or for the benefit of said affiant; that said affiant, his estate heirs, beneficiaries, executors, administrators, or assigns, directly or indirectly, are not, have not been, and will not be interested in or entitled to or the recipient of any contribution, payment, aid, assistance or relief from such insurance, relief benefit, or indemnity or otherwise from said plaintiff in error; that the only contribution or payment which has ever been made by said plaintiff in error to said affiant or for his benefit or otherwise is the payment of the wages earned by him from said plaintiff in error for labor performed and services rendered for it by him previous to the injury to him described in his complaint and testimony in said action and for which said action was brought; that all of such wages have been paid to him by said plaintiff in error; and that he has been unable to earn any wages from or continue in the employment of said plaintiff in error, or any other corporation, association or person, at any time since the injury for which said action was brought occurred;

That affiant makes this affidavit after mature consideration of the contents hereof; that he has carefully read the same and that the same is true to his own personal knowledge except as to those matters that are stated on information and belief and that he believes these to be true;

That this affidavit is made for the purpose of having it used by his attorney in opposition to or in support of any motion in the above-named Supreme Court of the United States touching any phase of said case, or for any other purpose for which such affidavit can be appropriately used.

WILLIAM H. GRAY.

Subscribed and sworn to before me this 13th day of March, 1915.

[NOTARY SEAL.] H. J. MULHOLLAND,
Notary Public, Outagamie County, Wisconsin.

My commission expires Jan. 5, 1919.

Affidavit of Stephen J. McMahon.

(Title of Case Omitted.)

STATE OF WISCONSIN,
Milwaukee County, ss:

Stephen J. McMahon, being first duly sworn, on oath deposes and says that he is the attorney for the above-named defendant in error; that he has been the attorney for the defendant in error and in charge of the litigation involved in this case for him since the commencement of said litigation;

That copies of the assignments of error of the plaintiff in error and of the record were not exhibited to and seen by deponent some time during the month of July, 1913, as claimed by counsel for the plaintiff in error in his motions herein, dated March 10, 1915, and set for argument on March 22, 1915, and March 23, 1915, respectively, before this court, and served on deponent without prejudice to the rights of the defendant in error on March 11, 1915, and March 10, 1915, respectively; that deponent had no opportunity to examine said assignments of error until on or about the 1st of October, 1913; that deponent was not admitted to practice as an attorney in this court until on or about October 12, 1913;

That in November, 1913, deponent requested counsel for the plaintiff in error, orally and in writing, to cause the record in this case to be printed pursuant to rule No. 10 of

this court and particularly subsection 2 thereof; that previous to the making of such request the clerk of this court, at the request of deponent, estimated the cost of the printing of the record at six hundred and fifty ($650.00) dollars; that at the time of the making of said request to counsel for the plaintiff in error deponent informed counsel for plaintiff in error of the amount of such estimate, and that in a letter under date of December 24, 1913, counsel for the plaintiff in error refused to cause said record to be printed in the following language quoted from his letter:

> "After taking the matter up at Washington, I have come to the conclusion that I am under no obligation to have the record printed on the motion to *affirm or dismiss.*"

That at the time deponent requested counsel for the plaintiff in error to cause the record in this case to be printed deponent informed counsel for the plaintiff in error that deponent desired to make a motion in this court pursuant to rule 6 of this court; that shortly after the said refusal of counsel for the plaintiff in error deponent requested the defendant in error to procure the money necessary to be advanced to have the transcript of the record printed; that at the same time deponent informed defendant in error that the clerk had estimated the amount to be advanced to have the record printed at six hundred and fifty ($650.00) dollars; that deponent is informed and verily believes that the defendant in error made a diligent effort to procure said money but was unable so to do; that the defendant in error, after the making of such effort, informed deponent that he was unable to procure said money then necessary to be so advanced; that at the time this deponent made such request to the defendant in error deponent informed the defendant in error that it was desirable and advisable that a motion be brought pursuant to the provisions of rule 6 of this court with a view to a speedy and final determination

and disposition of this case by this court in favor of the defendant in error and upon such grounds as might be properly advanced in behalf of the defendant in error;

That on or about October 12, 1913, deponent made oral inquiry of one of the deputy clerks of this court, the clerk being then absent on account of illness as this deponent was informed by said deputy, as to whether the clerk would require the plaintiff in error to cause the record to be printed without further delay, at the same time informing the deputy clerk of deponent's desire to make a motion pursuant to rule 6 of this court with a view to a speedy and final disposition and determination of this case by this court; and that said deputy clerk then informed this deponent that it was not the practice to cause the plaintiff in error to advance the money necessary for the printing of the record so far in advance of the time when the case would be reached in its regular order for hearing and determination by this court and said deputy clerk declined to cause the plaintiff in error to then advance such money;

That on February 6, 1915, there was served on deponent and accepted the brief of plaintiff in error; that on February 23, 1915, a carbon copy of the major part of the typewritten manuscript of the body of the brief of defendant in error was delivered to the attorney for plaintiff in error; that on February 27, 1915, the balance of the copy of the manuscript was delivered to the same attorney; that said deliveries were made through the United States mails in the city of Milwaukee where counsel for the plaintiff in error and the deponent both reside and have their places of business; that in the first part of the manuscript so delivered issue was joined with all of the parts of the brief of plaintiff in error and inadequacies and insufficiencies of the assignments of error of the plaintiff in error and the specification of errors in this brief were pointed out; that throughout the whole manuscript of the brief of defendant in error there were numerous references to the brief of plaintiff in error,

citing the numbers of the pages; that on March 1, 1915, near the middle of the day, service of three (3) copies of the brief of the defendant in error reprinted with an addition to the specification in errors and an assignment of errors, as appeared from a note upon the title page of said reprinted brief of plaintiff in error reading as follows: "This brief is filed for the purpose of adding fourth (4th) specification of error," or words substantially to this effect, was tendered to this deponent and the service and the copies were by him refused;

That such service was tendered by Mr. Charles H. Gorman, an assistant of counsel for the defendant in error; that at the time of such tender said Charles H. Gorman was informed by this deponent that such service was refused; that said Charles H. Gorman was then by this deponent requested to return all of said copies of said reprinted brief to the counsel for the plaintiff in error; that as soon as it was reasonably possible for this deponent to give further attention to the matter and on the 3d day of March, 1915, this deponent requested and directed Jeremiah F. Collins to return all of said copies of said reprinted brief to said counsel for the defendant in error; that since said 3d day of March, 1915, none of said copies of said reprinted brief of the plaintiff in error have been in the possession of or in any way under the control of the deponent; that they have not been returned to deponent;

That at the time this deponent so requested and directed said Jeremiah F. Collins to return said reprinted briefs to counsel for the plaintiff in error he also requested and directed said Jeremiah F. Collins to convey to said counsel for the plaintiff in error a letter written by this deponent in which this deponent's reasons for refusing service as aforesaid and returning said copies of said reprinted brief were set forth fully;

That these reasons were that at the time of the tender of service of said reprinted brief all of the original of the

manuscript of the brief of the plaintiff in error was in the hands of the printer and the part in which issue was joined with the brief of the plaintiff in error was set in type; that in view of the fact that there were references to the brief of plaintiff in error citing the numbers of the pages, acceptance of service of said reprinted brief of plaintiff in error would necessitate a revision of the brief of the defendant in error, including the part then in type; that such revision would require additional time and expense; that a revision by deponent of said reprinted brief would bring confusion into the brief of defendant in error because of the necessity of attempting to respond to two (2) briefs of plaintiff in error with different paging; that deponent desired not to waive by acceptance of said service of said reprinted brief any of the inadequacies or insufficiencies in the assignment of errors of the brief of defendant in error served on February 6, 1915; and that according to the best information then in the possession of deponent it was probable that it was too late under the rules of said court for the plaintiff in error to serve or file a printed brief;

That these reasons were in substance stated to said Charles H. Gorman at the time that the aforesaid copies of said reprinted brief and the tender of service thereof was refused as aforesaid;

That on or about the 21st day of September, 1914, the deponent received a copy of the printed transcript of the record in this case; that at that time deponent had been informed and verily believed that this case would be reached for argument and hearing in the regular order and due course about January or February, 1915; that when said printed record was so received the defendant in error was, as this deponent is informed and verily believes, in such poor financial circumstances that he concluded to await the final hearing and determination of the case, which then seemed liable to occur so soon thereafter, to present to this court through his attorney all of the questions as to whether

the writ of error should be dismissed or the judgments of the State courts affirmed for the reason that the defendant in error could not afford the double expense of having briefs printed upon motions and again upon the final hearing or the other additional expense which might be necessary to the proper presentation of any motion in advance of the final hearing and in addition to the expense necessary to the proper presentation in the above-named court of this case upon behalf of defendant in error upon such final hearing and argument; and

That the contentions and errors relied upon in the Supreme Court of Wisconsin by the defendant in error and its counsel were made, presented, treated, and discussed in the manner stated in the decision of the Supreme Court of Wisconsin at pages 289 to 293 of the transcript of the record in this case and in no other manner.

STEPHEN J. McMAHON.

Subscribed and sworn to before me this 13th day of March, 1915.

[NOTARY SEAL.] RAYMOND T. ZILLMER,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Sept. 29, 1918.

Affidavit of Jeremiah F. Collins.

(Title of Case Omitted.)

STATE OF WISCONSIN,
Milwaukee County, ss:

Jeremiah F. Collins, being first duly sworn, on oath deposes and says that he was present on the first day of March, 1915, shortly before noon of that day, when Charles

H. Gorman made a tender of service and delivery of three (3) copies of a printed brief of the defendant in error in the above-entitled case with a note endorsed on the title page thereof as follows: "This brief is filed for the purpose of adding Fourth (4th) Specification of Error," or words substantially to this effect; that he was present during all the conversation that then occurred between said Charles H. Gorman and Stephen J. McMahon, the attorney for the defendant in error above named; that said Stephen J. McMahon refused to accept service or delivery of said copies of said brief or any copies of a brief then tendered; that said Stephen J. McMahon stated his reasons for refusing to accept said tender of service or delivery of said copies of brief to said Charles H. Gorman in substance as follows:

That these reasons were that at the time of the tender of service of said reprinted brief all of the original of the manuscript of the brief of the plaintiff in error was in the hands of the printer, and the part in which issue was joined with the brief of the plaintiff in error was set in type; that in view of the fact that there were references to the brief of the plaintiff in error, citing the numbers of the pages, acceptance of service of said reprinted brief of plaintiff in error would necessitate a revision of the brief of the defendant in error, including the part then in type; that such revision would require additional time and expense; that a revision by Stephen J. McMahon of said reprinted brief would bring confusion into the brief of defendant in error because of the necessity of attempting to respond to two (2) briefs of plaintiff in error with different paging; that Stephen J. McMahon desired not to waive by acceptance of said service of said reprinted brief any of the inadequacies or insufficiencies in the assignment of errors of the brief of defendant in error served on February 6, 1915, and that, according to the best information then in the possession of Stephen J. McMahon, it was probable that it was too late,

under the rules of said court, for the plaintiff in error to serve or file a printed brief;

That on the 3d day of March, 1915, at about the hour of 5:30 o'clock P. M., this deponent, at the request and under the directions of said Stephen J. McMahon, returned to Edward M. Smart, counsel for the defendant in error, all of the aforesaid copies of said printed brief so tendered by said Charles H. Gorman to said Stephen J. McMahon; that he delivered the same to said Edward M. Smart personally at his office, delivering all of said copies of said printed brief; that deponent then and there left all the said copies with and in the possession of said Edward M. Smart; that said Edward M. Smart then and there retained the possession and control of all of said copies of said printed brief; that at the time that the deponent so returned all of said copies of said printed brief to said Edward M. Smart, the deponent then and there delivered to said Edward M. Smart a letter addressed to him and dated March 3, 1915, and signed by said Stephen J. McMahon, in which letter the aforesaid reasons as heretofore stated in substance for the refusal of said Stephen J. McMahon to accept the tender of service made by said Charles H. Gorman as aforesaid were fully set forth; that said Edward M. Smart accepted and retained said letter in the same manner and at the same time and place that he accepted and retained as aforesaid all of the copies of said printed brief.

JEREMIAH F. COLLINS.

Subscribed and sworn to before me this 13th day of March, 1915.

[NOTARY SEAL.] RAYMOND T. ZILLMER,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Sept. 29, 1918.

Affidavit of Raymond T. Zillmer.

(Title of Case Omitted.)

STATE OF WISCONSIN,
Milwaukee County, ss:

Raymond T. Zillmer, being first duly sworn, on oath deposes and says that he was present on the first day of March, 1915, shortly before noon of that day, when Charles H. Gorman made a tender of service and delivery of three (3) copies of a printed brief of the defendant in error in the above-entitled case, with a note endorsed on the title page thereof as follows: "This brief is filed for the purpose of adding Fourth (4th) Specification of Error," or words substantially to this effect; that he was present during all the conversation that then occurred between said Charles H. Gorman and Stephen J. McMahon, the attorney for the defendant in error above named; that said Stephen J. McMahon refused to accept service or delivery of said copies of said Stephen J. McMahon, stated his reasons for refusing to accept said tender of service or delivery of said copies of brief to said Charles H. Gorman in substance as follows:

That these reasons were that at the time of the tender of service of said reprinted brief all of the original of the manuscript of the brief of the plaintiff in error was in the hands of the printer, and the part in which issue was joined with the brief of the plaintiff in error was set in type; that in view of the fact that there were references to the brief of the plaintiff in error, citing the numbers of the pages, acceptance of service of said reprinted brief of plaintiff in error would necessitate a revision of the brief of the defendant in error, including the part then in type; that such revision would require additional time and expense; that a revision by said Stephen J. McMahon of said reprinted brief would bring confusion into the brief of defendant in error

because of the necessity of attempting to respond to two (2) briefs of plaintiff in error with different paging; that said Stephen J. McMahon desired not to waive by acceptance of said service of said reprinted brief any of the inadequacies or insufficiencies in the assignment of errors of the brief of defendant in error served on February 6, 1915; and that, according to the best information then in the possession of said Stephen J. McMahon, it was probable that it was too late, under the rules of said court, for the plaintiff in error to serve or file a printed brief.

RAYMOND T. ZILLMER.

Subscribed and sworn to before me this 13th day of March, 1915.

[NOTARY SEAL.] THEO. ZILLMER,
Notary Public, Milwaukee County, Wis.

My commission expires Nov. 5, 1915.

Notice of Motion.

(Title of Case Omitted.)

SIR: Please take notice that the plaintiff in error, Chicago and North Western Railway Company, will, at the regular motion day of the above-entitled court, to wit, March 22, 1915, at the opening of court on said day, or as soon thereafter as counsel can be heard, or in case the said cause shall be called for argument prior to said date, then at the time said cause is called for argument, move the court, as set forth in the annexed written motion.

Respectfully,

EDWARD M. SMART,
Counsel for Plaintiff in Error.

To Stephen J. McMahon, Attorney for Defendant in Error.

Service of the above notice of motion admitted this 11th day of March, 1915, without prejudice, however, to the rights of the defendant in error.

STEPHEN J. McMAHON,
Counsel for Defendant in Error.

Motion of Plaintiff in Error.

(Title of Case Omitted.)

And now comes the above-named plaintiff in error, Chicago and North Western Railway Company, and on the record herein, the briefs of counsel heretofore served and filed, and the affidavit of Edward M. Smart, hereto annexed, and moves this honorable court for leave to amend the assignment of errors in these proceedings by adding to such assignment of errors, at the end of the seventh assignment of error, found on page 7 of the record (Trans., p. 3), a further and additional assignment of error, in the following words, to wit:

> "*Eighth.* That the municipal court did not err in rejecting and striking out the testimony of the witness Armstrong, which was in substance as follows:
>
> " 'Mr. ARMSTRONG, recalled by the defendant: I am familiar with the character and kind of business done by the Chicago and North Western Railway Company on our division at Antigo. As I understand it, interstate traffic is the exchange of business between two States.
>
> " 'Q. At and prior to the plaintiff's accident was the North Western road, its trains, engines, and employees engaged in hauling cars of freight continuously between Michigan and State of Wisconsin and points in Illinois and State of Wisconsin?
>
> " 'A. Yes, sir.
>
> " 'Moved to have the answer struck out. Motion granted.

" 'Objected to because it does not appear what employees are meant, and further objection is immaterial, incompetent, and irrelevant as to whether their engines, their employees, and their trains and crews may have or might have been in any respect engaged in interstate traffic, and that the only thing material, if at all, would be the use made of this particular engine, that is, the engine on which the plaintiff was hostler.

" 'By the COURT: Objection sustained. The only question is as to this engine, as I can see it; the engine on which this person was engaged at the time.

" 'By Attorney MARTIN: My objection goes to all of these questions: 1st. Because the witness is not competent. 2d. Because the testimony is not admissible under the pleadings. 3d. The testimony itself is incompetent, irrelevant, and immaterial.

" 'Engines that were being hostled at this round-house at the time in question were making trips from Antigo to Ashland, going through Michigan. At the same time engines and trains were making connection with the Watersmeet branch (elsewhere appearing to be in Michigan). Engines running south won't run out of the State, but in coming to and going from the south they handle refrigerator cars from Chicago. The dispatcher is under the jurisdiction of the foreman of the round-house, and Mr. Gray was under the dispatcher's jurisdiction. The round-house is the place where all these engines that come in from runs there rest. They clean all the coal and cinders out and get wood and water and are put in there to stay until the next trip. Some repairs are done in the round-house, too. The dispatcher takes the engine, after the train crew leaves it, near the round-house. The round-house, with the coal shed, sand-house and cinder pit and the blow-off box and these other buildings are all crowded together. I know of no definition in the railroad service as to what constitutes employees, or who shall be employed on the road, and no standard is fixed so far as I can see as to where the division line is.

" 'Exhibit "9" is a photograph taken at or near the north end of the cinder pit looking south in the city of Antigo.

" 'The plaintiff now moves to strike out all the testimony of this witness except his testimony identifying Exhibit "9," for the reason urged in our objection to the testimony when first offered, that is the testimony elicited from this witness since he was last called to the witness stand, and bearing generally upon the question of so-called interstate traffic.

" 'The motion is granted as far as the testimony goes to the phase of interstate traffic.

" 'Whereupon the defendant duly excepted.

" 'The plaintiff moves to strike out the balance of the testimony, for the reason it is immaterial, incompetent, and irrelevant, and now moves to strike it out.

" 'The motion is granted.

" 'Whereupon the defendant duly excepted' " (Trans., pp. 236 to 238).

Plaintiff in error submits the following statement of facts and objects of this motion:

This is a proceeding in error to review a decision and judgment of the Supreme Court of the State of Wisconsin affirming a judgment of the municipal court of Outagamie County, Wisconsin, in a personal injury action brought by the defendant in error against the plaintiff in error to recover damages on account of injuries received by the defendant in error while in the employ of the plaintiff in error. The respective parties will be referred to as "Gray" and "Railway Company."

Gray was run down and injured by an engine in the railroad yards at Antigo, Wisconsin, while employed by the railroad company as an engine dispatcher.

The complaint in the action was not brought under the Federal Employers' Liability Act, and did not disclose that either Gray or the railroad company were employed in interstate commerce at the time of the injury. Gray, in presenting his case in the trial court, proved the facts showing the nature and character of his employment and duties, but did not disclose employment in interstate commerce. When the railroad company took the case, in addition to other facts

proven in the case without objection, it introduced the evidence of the witness Armstrong, set forth in the above proposed additional assignment of error, which evidence was subsequently stricken out, as above set forth, for the reasons specified. It was claimed by the railway company that this proof, together with the other facts admitted in evidence, showed or tended to show employment by Gray in interstate commerce, and that if there was any liability on account of such injury, it was governed and determined solely by the Federal Employers' Liability Act.

Judgment was rendered against the railway company in the trial court, and an appeal was taken to the Supreme Court of the State of Wisconsin, wherein the judgment of the trial court was affirmed in an opinion, decision, and judgment of the said Supreme Court, which is fully set forth in the record (Trans., pp. 286, 293).

The said Supreme Court held, under the evidence received and the said evidence so stricken out as aforesaid, that the said Gray was not employed in interstate commerce. While it is true that in said court the error reviewed by it was the ruling of the trial court striking out the said evidence, yet it is apparent from said opinion that the court treated the same as if admitted, and then determined the nature and character of Gray's employment from said evidence and all the other evidence in the case; that thereupon the railway company filed its petition for writ of error, and made assignments of error, as set forth in the record (Trans., pp. 3 and 4); that said record was filed in this court on the 2d day of August, 1913, and the same was printed, and copies thereof delivered to counsel for plaintiff in error on or about the 21st day of September, 1914; that copies of the said assignments of error and the record were exhibited to and seen by the counsel for the defendant in error some time during the month of July, 1913.

That on the 6th day of February, 1915, counsel for the railway company duly served upon counsel for Gray a copy

of his original brief; that a few days before March 1, 1915, counsel for Gray submitted to counsel for the railway company a copy of a part of the manuscript of his brief, wherein was set forth and argued the point that the assignment of errors and specification of errors were insufficient under the statutes and rules of this court, which said point and argument are now set forth on pages 32 and 33 of the printed brief of defendant in error.

That immediately upon receiving said manuscript brief, as aforesaid, counsel for the railway company reprinted his brief under the title of "Amended Brief of Plaintiff in Error," and added thereto a fourth "Specification of Error," which said fourth specification of error is found on pages 11 and 12 of "Amended Brief of Plaintiff in Error," in the same language as is set forth in the above proposed eighth assignment of error; that the said reprinted and amended brief was duly and personally served on counsel for Gray on the 1st day of March, 1915, at 10:30 a. m., as appears by the proof of service on file in this court, and thereupon thirty copies of the said "Amended Brief of Plaintiff in Error" were immediately and duly filed with the clerk of this court, and are now on file herein; that at the time of the service of said amended brief of plaintiff in error the brief of defendant in error was in the process of being printed, and was thereafter completed and served on counsel for the railway company on the 3d day of March, 1915, at 5:30 p. m.; that counsel for the railway company had never, prior to the service of said manuscript, received any notice or intimation from counsel for Gray of his intention to make such a point, or his claim in regard thereto, nor has the said counsel ever made any motion in this court based on the inadequacy of said assignment of errors.

That the failure of counsel for the railway company to make proper specification of errors was due to inadvertence and oversight and due to the peculiar manner in which the question was raised, discussed, and disposed of in the State

Supreme Court, as more particularly set forth in the affidavit of counsel for the railway company hereto annexed.

Counsel for plaintiff in error submits the following authorities on the proposition that this court has power and authority to permit amendment of assignment of errors, to wit:

2 Encyclopedia Pleading and Practice, 920.
Ackley *vs.* Hall, 106 U. S., 428.
Bunyan *vs.* Loftus, 57 N. W., 685.
Hall *vs.* Railway, 84 Ia., 311.
Hubbard *vs.* Garner, 73 N. W., 390.

EDWARD M. SMART,
Counsel for Plaintiff in Error.

Dated March 10, 1915.

Affidavit of Edward M. Smart.

(Title of Case Omitted.)

STATE OF WISCONSIN,
Milwaukee County, ss:

Edward M. Smart, being first duly sworn, on oath says that he is counsel for the above-named plaintiff in error; that he has read the foregoing and annexed motion and statement of facts and objects of motion, and that the facts and objects therein set forth are true, as he verily believes; that the failure to make an accurate assignment of errors in this proceeding was due entirely to affiant's inexperience in proceedings of this kind, and also to the inadvertence and oversight of affiant.

Affiant further says that proceedings by way of writ of error to review the decisions of inferior tribunals is not employed excepting in criminal cases and rare instances in the

State of Wisconsin, the common and statutory method of review in said State being by statutory appeal; that affiant has never, in any proceeding heretofore, excepting in one instance, sued out a writ of error; affiant further says that the reason why said proposed assignment of error was not made in the form now proposed was that because of the manner in which the said questions raised thereby were treated and discussed in the Supreme Court of the State of Wisconsin he was led to believe, and did believe, that the said court treated the evidence rejected the same as if it had been admitted, and decided the whole question the same as if said evidence had been admitted; that by reason thereof affiant inadvertently overlooked the fact that the said ruling was technically a ruling on the rejection of evidence, and for that reason an assignment of error should have been made in the form now proposed.

Affiant further says that no harm or prejudice has been done to the defendant in error, and the said defendant in error and the plaintiff in error have both fully set forth the facts and rulings in their respective briefs, and have fully set forth at length in said briefs the evidence so rejected.

EDWARD M. SMART.

Subscribed and sworn to before me this 10th day of March, 1915.

ALBERT M. KELLY,
Notary Public, Milwaukee County, Wisconsin.

My commission expires October 13, 1918.